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No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER KAISER STEEL CORPORATION

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REPLY BRIEF FOR PETITIONER KAISER STEEL CORPORATION

ARGUMENT

The central question in this case is whether a federal court should lend its aid to, and require specific performance of, a contract provision that violates the federal antitrust and labor laws. In its opening brief, Kaiser Steel showed that, before this case, no court had ever enforced an illegal contract provision, and it summarized a long line of Supreme Court and lower court cases holding that illegal contract clauses may not be enforced in any way. Kaiser Steel also discussed the policy reasons behind the rule that courts do not enforce illegal contract provisions and explained why courts have refused to make exceptions to it based on the identity of the parties, allegations that the plaintiff was seeking accrued obligations or that the defendant had received the consideration owed him, or other factors.

Respondents and the *amici* that support them have ignored many of the points set forth in Kaiser Steel's opening brief. The arguments they have advanced are applicable only where a party seeks either to avoid complying

with a valid contract provision on the basis of some defense unrelated, extraneous or collateral to the lawfulness of that provision or to obtain affirmative judicial remedies for alleged violations of law. These arguments have no application to cases, like this one, in which a plaintiff is seeking judicial enforcement of a contract clause that itself violates federal law. No court has ever before enforced such a contract clause, and this Court should not do so now.

I. FEDERAL COURTS DO NOT ENFORCE ILLEGAL CONTRACT PROVISIONS.

Respondents have advanced essentially two arguments in response to Kaiser Steel's explanation of the reasons for the rule that courts do not enforce illegal contract clauses and its demonstration why enforcing the illegal purchase-of-coal clause would lead to an inequitable result in this case.[1] These arguments, however, apply only where a defendant is seeking to avoid complying with a lawful contract provision on the basis of collateral or unrelated defenses; they provide no basis for enforcing a contract provision, like the purchase-of-coal clause, that is itself illegal.

A. Pension Funds Are Not Exempt from the Rule That Courts Do Not Enforce Illegal Contract Clauses.

On the strength of *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), Respondents argue that "special considerations" exempt pension funds from the rule that courts do not enforce illegal contract clauses.[2] But *Benedict Coal* carved out no such exemption.

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[1] *See* Brief for Petitioner ("Pet. Br.") at 11-31.

[2] Brief for Respondents ("Res. Br.") at 9-14. This is also the basic position advanced by the union and pension fund *amici* in this case. The Solicitor General evidently disagrees with this position. As he puts it, the availability of the illegality defense in contract enforcement suits by pension fund trustees has always been governed by "the same legal rules that governed the availability of the defense . . . in any type of suit . . . ." Brief for the United States as *Amicus Curiae* ("S.G. Br.") at 13.

Benedict Coal did not involve an effort to enforce an illegal contract clause.[3] There, pension fund trustees sued an employer for payments due on coal produced by that employer in accordance with the 1950 collective bargaining agreement between coal operators and the UMW. The employer did not argue that the contract provision requiring such payments was illegal or that payment would violate federal law; rather, it argued that strikes by the union violated other provisions of the collective bargaining agreement and that the damages it suffered as a result of the union's breaches should be set off against its liability to the funds under the separate, lawful royalty clause. The Court held that the employer's right to such a set off depended on whether the collective bargaining agreement could be construed as making performance by the union a condition precedent to the employer's promise to pay royalties or as making the trustees' right to payment subject to counterclaims the employer might have against the union.

In order to resolve the question of contract construction at issue there, the Court in *Benedict Coal* first analyzed the contract and found that the provision calling for contributions to the pension fund was a valid obligation that gave rise to enforceable rights irrespective of breaches

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[3] The lower court cases upon which Respondents rely (Res. Br. at 11-13) are similarly inapposite. In *Trustees, Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097 (N.D. Ga. 1981), the court held only that, under Section 8(f) of the NLRA, the absence of majority status by the union does not preclude enforcement of a lawful contract provision in a validly executed "prehire" agreement that had never been repudiated by the employer. *See* n.37, *infra*. *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), and the other cases cited by Respondents involved efforts by employers to resist compliance with *lawful* contractual obligations to make pension fund contributions on account of the illegality of *other* contract provisions or union activities outside the contract. (In his concurring opinion in *Long's Hauling*, Judge Adams said that he would prefer a rule that would bar all employer defenses in contract enforcement actions brought by pension funds. No court has adopted such a rule.)

by the union of other contract provisions.[4] Then, relying in part on Section 301(b) of the Taft-Hartley Act, the Court concluded that the employer should not be permitted in effect to collect from the pension fund a money judgment owed to it by the union where there was no indication in the collective bargaining agreement that "the parties contracted to protect [the employer] by allowing the company to set off its damages [owed by the union] against its royalty obligation."[5]

Here, in contrast, the allegation is that the purchase-of-coal clause is illegal and void and creates no enforceable obligations; nothing in *Benedict Coal* says that pen-

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[4] 361 U.S. at 465-66. The Court's analysis made clear that the pension fund would not have been entitled to recover had the contract provision it sought to enforce not created valid and binding obligations. *See Lewis v. Mears*, 297 F.2d 101, 104 (3d Cir. 1961), *cert. denied*, 369 U.S. 873 (1962) (*Benedict Coal* does not preclude employer from proving that no valid contractual obligation to pay royalties to pension fund trustees ever came into being); *Lewis v. Lowry*, 295 F.2d 197, 199 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962) (fact that suit was brought by pension fund trustees did not foreclose the employer's defense that no contract existed or that the agreement sued upon did not represent the real agreement between the employer and the union).

[5] 361 U.S. at 469, 470-71. The Court also noted that the payments sought by the pension fund were based upon the amount of services rendered by the union employees and could be characterized as a form of compensation to those employees. *Id.* at 469. In contrast, the payments sought by Respondents here are measured by the amount of coal purchased from non-UMW producers, not by services rendered by Kaiser Steel's employees. (*See* Pet. Br. at 6-7; *see also id.* at 4 n.4, 28-29 n.52.) Indeed, the penalty payments were not the real consideration sought by the union in insisting upon the purchase-of-coal clause in this case; instead, the union wanted Kaiser Steel to boycott non-UMW producers. (It is possible, as Respondents suggest, that if Kaiser Steel had participated in the unlawful boycott of non-UMW producers there would have been an increase in the amount of coal produced by UMW producers and a corresponding increase in the royalties payable to the funds on produced coal. But, in that event, there would have been additional UMW employees providing additional labor services, and the pension funds would have incurred additional obligations.)

sion funds are entitled to reap the benefits of illegal agreements or to obtain the aid of federal courts in enforcing void and unenforceable contract provisions. Moreover, while the Court in *Benedict Coal* sought to insulate the pension funds from the employer's wholly unrelated claim for money damages from the union, Kaiser Steel is not here trying to collect any money owed to it by the union or otherwise to raise collateral or unrelated defenses to the trustees' claim. Indeed, Respondents here concede (as they must) that Kaiser Steel's defense does directly concern their entitlement to enforce the purchase-of-coal clause, for they concede that they could not avoid being parties to any litigation brought by Kaiser Steel or any other UMW employer seeking declaratory or injunctive relief from that clause.[6] Thus, the gulf that the Court found in *Benedict Coal* between the provision the pension fund sought to enforce and the employer's defense—its damage claim against the union—does not exist in this case.

B. *Kelly v. Kosuga* Distinguished Between Lawful and Unlawful Contract Provisions and Held That Only Lawful Provisions May Be Enforced.

Unable to find a single case that has enforced an illegal contract clause, Respondents rely heavily on an expansive reading of dictum in *Kelly v. Kosuga*, 358 U.S. 516 (1959). Respondents misunderstand *Kelly* and later cases applying it.

As Kaiser Steel explained in its opening brief, *Kelly* involved two contracts, a lawful sale agreement and an

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[6] Res. Br. at 14. It is for this reason, among others, that the argument of *amicus curiae* National Coordinating Committee for Multiemployer Plans ("NCCMP") is without merit. NCCMP argues that the illegality defense should be rejected in this case so that pension funds will not have to take sides in contract disputes between unions and employers. But because the pension funds would be proper defendants in litigation brought to challenge the purchase-of-coal clause under the legal scheme adopted by the Court of Appeals and urged by Respondents, the funds will in any event have to defend the legality of the clause in litigation.

unlawful "nondelivery" agreement. *Kelly* held that the sale agreement was enforceable but that the illegal nondelivery agreement could not be enforced.[7]

In reading *Kelly*, Respondents seize upon the Court's observation that "analysis in terms of divisibility or some other verbal formula may well be circular"[8] and try to convert it into a holding that lawful agreements

[7] *See* Pet. Br. at 12-13. In response to Kaiser Steel's statement that, until this case, no court had ever enforced an illegal contract clause, Respondents assert that "the rule of *Kelly* has been followed consistently" (Res. Br. at 18 n.17). But the "rule in *Kelly*" is that lawful contract clauses may be enforced but unlawful ones may not be. The prior cases cited by Respondents involved only the enforcement of lawful contract clauses. *See Arkla Air Conditioning Co. v. Famous Supply Co.*, 551 F.2d 125, 127 (6th Cir. 1977) (per curiam) (alleged illegality of an exclusive sales territory provision collateral to the contract sought to be enforced held no bar to enforcement of the defendant's lawful obligation to pay commissions); *El Salto, S.A. v. PSG Co.*, 444 F.2d 477, 482 (9th Cir.), *cert. denied*, 404 U.S. 940 (1971) (allegation that buyer had received unlawful commissions no defense to seller's suit for lawful purchase price where "no part of the money sought" by the seller "represented payments barred by the antitrust laws"); *Sunshine Packers, Inc. v. American Can Co.*, 395 F.2d 86, 88 (5th Cir. 1968) (fact that lender may have been barred by consent decree from making loan no defense to obligation of borrower who induced the loan to comply with lawful promise to repay); *Pennington v. UMW*, 325 F.2d 804, 806, 818 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965) (unlawful union security clause that could be "severed and separately condemned" no bar to enforcement of legal contract clause). *Viacom Int'l, Inc. v. Tandem Prods., Inc.*, 526 F.2d 593 (2d Cir. 1975), and *Mullins v. Reitz Coal Co.*, 105 L.R.R.M. 2776 (D.D.C. 1979), are discussed in Kaiser Steel's opening brief at 30 n.56 and 22 n.35.

Respondents also rely heavily on *Bruces's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947), but that case does not help them, either. The defendant there tried to avoid paying for goods purchased on the ground that the seller had offered larger discounts to third parties. The Court rejected the defense on the ground that the contract sued on was lawful and the violation of law, if any, was that the seller charged other purchasers a lower price.

[8] 358 U.S. at 521, *quoted in* Res. Br. at 17.

may not be separated from unlawful agreements. (Res. Br. at 17.) Closer reading of the case, however, makes clear that the Court held just the opposite.[9]

As Respondents note (Res. Br. at 16), the defendant in *Kelly* did argue that the lawful sale agreement was not separable from the illegal nondelivery agreement and, on the basis of that premise, that the plaintiff was seeking to enforce "the very agreement" that violated the antitrust laws. The Court, however, rejected that characterization of the case: Referring separately to the "nondelivery agreement" and the "sale of onions" (358 U.S. at 521), the Court said that the defendant was really arguing that he should not be required to comply with the lawful sale agreement because the illegal nondelivery agreement bore "some relation to the suit" for the purchase price (*id.* at 519). Concerned by "the breadth of [such] argument" (*id.* at 520), the Court held that the lawful sale for a fair consideration could be enforced even though it "furnished the occasion" for the illegal nondelivery agreement (*id.* at 521). The Court in *Kelly* thus rejected the argument that it could not separate the lawful agreement from the illegal agreement, distinguished the two, and held that the former was enforceable even though the latter was not.

Respondents also make much of two policy interests identified in *Kelly*—preventing people from getting "other people's property for nothing" and a reluctance to create additional antitrust remedies. (Res. Br. at 20-21). But, as explained in Kaiser Steel's opening brief, *Kelly* identified those interests only as support for its decision to enforce the *lawful* agreement there at issue, and those interests were implicated in *Kelly* in ways that have no relevance to this case.[10]

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[9] Respondents' interpretation of the Court's discussion of the "divisibility" issue has other flaws. *See* Pet. Br. at 13 n.18; *see also id.* at 18 n.28.

[10] *See* Pet. Br. at 24 n.39 and 28-29 n.52. Respondents' effort to apply the policy interests of *Kelly* to this case suffers from other

Moreover, Respondents' policy argument proves too much, for it would mean that a court could never decline to enforce an illegal contract where other antitrust remedies were available and consideration had passed to the defendant. *Kelly* itself rejected this theory by stating unequivocally that the nondelivery agreement, if illegal, "could not be enforced." 358 U.S. at 521.

The straightforward reading of *Kelly*, then, is that lawful agreements are enforceable but illegal ones are not. Because that reading does not help Respondents, they urge a more strained interpretation of *Kelly* that focuses instead on the steps the defendant would be required to take if ordered to comply with the illegal agreement. According to Respondents, illegal contracts are enforceable except in those few cases where the remedial steps themselves would be illegal conduct. (Res. Br. at 18, 22-25.)

Respondents' reading of *Kelly* thus depends on the purported distinction between illegal conduct and conduct taken pursuant to an illegal contract provision. Indeed, it appears fair to say that Respondents' whole theory of this case turns on that distinction, for their analysis (and the Solicitor General's as well) of Section 306(a) of the 1980 ERISA Amendments also rests on it. Thus, Respondents contrast conduct taken pursuant to illegal agreements with conduct that is "itself" illegal (Res. Br. at 45), and the Solicitor General distinguishes conduct taken pursuant to illegal agreements from conduct that

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problems as well. Enforcement of the lawful sale agreement in *Kelly* did not cause any antitrust injury; by the same token, if the defendant in *Kelly* had been permitted to use the illegality of the nondelivery agreement to avoid his obligations under the lawful sale contract, he would indeed have been able to supplement the antitrust remedies available to him for any injuries he suffered on account of the collateral illegality of the nondelivery agreement with the additional remedy of getting the onions delivered under the lawful sale agreement for nothing. In this case, in contrast, enforcement of the illegal purchase-of-coal clause would both consummate an antitrust violation and cause antitrust injury, and nonenforcement would prevent those consequences. *See id.* at 16-17.

is illegal "in and of itself" (S.G. Br. 11) or that would be illegal even if "gratuitous" (*id.* at 30).

Such a distinction has no legal significance. It fails to take account of the fact that conduct that is lawful "in and of itself" or when undertaken gratuitously becomes unlawful conduct when it is undertaken pursuant to or in furtherance of an illegal agreement.[11] *Kelly* itself made this clear. A unilateral decision by the defendant in that case not to deliver its onions to the futures market would have been entirely lawful. The antitrust laws do not prohibit such conduct "in and of itself." But that otherwise lawful activity became illegal conduct when undertaken pursuant to an illegal agreement.[12] Thus, when the Court in *Kelly* said it would not enforce the nondelivery agreement, it was saying—not that it was unwilling to order conduct that was illegal in and of itself—but rather that it would not order conduct pursuant to an illegal agreement. All such conduct is illegal conduct, and enforcing the illegal purchase-of-coal clause would thus also be enforcing illegal conduct.[13]

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[11] *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) ("acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme"); *Hyde v. United States*, 225 U.S. 347, 360 (1912).

[12] As the Court noted in *UMW v. Pennington*, 381 U.S. 657, 665 & n.2 (1965), conduct that would not state any claim under the Sherman Act when taken by a union "[u]nilaterally, and without agreement with any employer group" may give rise to antitrust liability when taken pursuant to an agreement with a set of employers.

[13] Respondents may theorize that *Kelly* is different from this case on the ground that the antitrust laws were intended to prevent the boycott of futures markets at issue there, but not to prevent the payment of money pursuant to illegal hot cargo clauses. Such a theory could not be reconciled with the many cases that have refused to enforce otherwise lawful payments of money called for by illegal agreements (*see* pp. 10-12, *infra*), and it rests on an erroneous view of the antitrust and labor laws. Those laws are intended to protect employers like Kaiser Steel from being burdened by clauses like the purchase-of-coal clause. The antitrust laws are intended to protect their freedom as traders to do business with whomever

Moreover, the distinction Respondents would draw cannot be reconciled with the many cases discussed in Kaiser Steel's opening brief in which courts have refused to enforce illegal contract clauses. (Pet. Br. at 19-22, 28 n.52.) All those cases involved efforts to enforce contract provisions that required the payment of money. In each of them the plaintiff, like Respondents here, was seeking accrued obligations. In none of them would the remedy sought have required conduct that was itself illegal. Yet, in all of the cases, the courts refused to lend their aid to enforcing the illegal agreements by requiring the payment of penalties, profits, prices or damages for past conduct, or in any other way. These cases are indistinguishable from this case, and they were correctly decided.[14]

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they wish without being penalized for doing so (*see generally Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911)); and, as this Court emphasized in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), the primary purpose of Section 8(e) is to protect "neutral" employers like Kaiser Steel from being harmed by the union's dispute with someone else. *See also* Pet. Br. at 14-18, 36, 38-39. Thus, it cannot be said that the antitrust and labor laws are intended only to prevent boycotts of third parties and are indifferent to the effect compliance with the purchase-of-coal clause would have on Kaiser Steel.

[14] Respondents struggle for ways to distinguish these cases (Res. Br. at 19-20 n.18), but they are unable to do so. *McMullen v. Hoffman*, 174 U.S. 639 (1899), *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), *United States v. Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955), and *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970), Respondents say, are distinguishable because the consideration running to the defendants was illegal. Respondents do not, however, explain why that should matter, and nothing in the courts' analyses suggests that the cases turned on that fact.

Respondents argue that the court in *Eiberger v. Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980), refused to enforce the contract provision at issue there on the ground that the claimant was not entitled to the fees it sought because they were "unearned." But that is not what the court held.

These cases reflect the heretofore uniform rule that courts will not give their imprimatur to violations of fed-

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The contract at issue in *Eiberger* imposed on Eiberger, in consideration for his obtaining a Sony distributorship and Sony's obligations in connection therewith, various duties including an obligation to pay so-called "warranty fees" to Sony for any sales made by Eiberger outside his assigned territory. Sony argued that the payments were necessary to pay for warranty work done on merchandise sold by Eiberger in other distributors' territories. The court found, however, that the fees were "unearned," and thus illegal, because they were not payments for warranty work but rather constituted an unlawful inducement to Eiberger not to make extraterritorial sales. The court held that, because the warranty fee provision was illegal, Sony could not collect even accrued payments thereunder. *Eiberger* is indistinguishable from this case: Here, too, the payments are "unearned" in the sense that they are not compensation for particular services but rather are measured by and intended to deter Kaiser Steel's dealings with third parties. Here, too, the contract provision calling for the payments is illegal and thus may not be enforced, even for accrued payment obligations.

Respondents misunderstand *Revlon, Inc. v. Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961), and *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976). They argue that those cases "distinguished between enforcement of an illegal contract requiring future conduct and one for goods or services already delivered" (Res. Br. at 19 n.18). But, like *Eiberger*, *Revlon* was a suit for penalty payments for extraterritorial dealing by a distributor. Contrary to Respondents' reading, the case did not involve "enforcement of an illegal contract requiring future conduct" but, like this case and *Eiberger*, the imposition of penalties for "buying outside" in the past. *See* 214 N.Y.S.2d at 460. In *Carpa*, the court said that it would enforce a lawful obligation to make certain lease payments on the ground that the obligation was "collateral" to an allegedly illegal tying arrangement implemented by a penalty provision in the contract. 536 F.2d at 54-55. But the court made clear that it "would be confronted with an entirely different situation if [the franchisor] was before us seeking to enforce the 20% penalty provision for buying outside." *Id.* at 55 n.6. Such penalty payments—like the penalty payments sought here—would not be for additional goods bought or services rendered, and "the franchisor would be enlisting the Court's aid in directly breaching the antitrust laws." *Id.*

[Footnote continued on page 12]

eral law by enforcing illegal contracts in any way. This principle both defines the role of federal courts and safeguards the policies sought to be served by the laws that make certain kinds of contract provisions illegal. Affirming the Court of Appeals' decision in this case would depart from this principle and undermine those policies: It would cause an injury those laws are intended to prevent; it would, by holding out the prospect of enforcement of illegal contract provisions in the future, create incentives for others to include illegal provisions in their agreements and to comply with them; and it would encourage parties who, like Kaiser Steel, are unwilling to participate in illegal conspiracies to bring unnecessary litigation challenging the lawfulness of contract clauses that might otherwise be ignored and remain unenforced.[15]

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[14] [Continued]

Respondents make no effort to distinguish *Weil v. Neary*, 278 U.S. 160 (1929), or *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). And they would distinguish *Kogod v. Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1950), on the ground that the plaintiff there was a third party beneficiary that had not provided any goods or services. That, of course, could be said about Respondents in this case as well.

[15] Affirming the Court of Appeals' decision in this case would also be inequitable. If Respondents had brought suit to enforce the purchase-of-coal clause at the outset of the 1974 agreement, their ability to enforce that clause and to collect the payments called for by it would have depended upon the lawfulness of the clause: If the clause were lawful, they could have enforced it; if it were illegal, they could not have reaped its benefits. Respondents wish now to be better off than they would have been had they initiated such litigation. There is no reason why Respondents should get such a benefit from delay in litigation. As we explained in our opening brief, only Respondents knew whether they intended to abandon their longstanding policy of not enforcing the purchase-of-coal clause, so only they knew whether litigation regarding the clause was necessary. (Pet. Br. at 7 & n.12, 26-27.) It is thus Respondents, if anyone, who should bear the burden of any delay in resolving the legality of the purchase-of-coal clause; they should not be permitted to turn that delay into an excuse for undeserved windfall gains.

II. FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER CONTRACT CLAUSES THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e).

In our opening brief, we explained that, whatever may be the jurisdiction of federal courts to provide affirmative remedies for violations of certain laws, those courts have jurisdiction to determine whether a contract clause violates federal law before using their equitable powers to enforce it; and we explained that Congress intended no exception to this rule in enacting Section 8(e) of the LMRA. (Pet. Br. at 32-47.) In response, Respondents have made, in essence, three arguments. These arguments, however, apply only where a party seeks a federal court remedy to redress labor law violations; they do not support the proposition that federal courts are without jurisdiction to decide whether contract clauses they are asked to enforce are illegal.

First, in contrast to their expansive reading of judicial dicta, Respondents are remarkably stingy in construing statutory language. According to Respondents, Section 8(e) does not mean what it says in providing that "any contract or agreement" containing an illegal hot cargo clause "shall be to such extent unenforcible and void." 29 U.S.C. § 158(e) (1976). Instead, Respondents argue, "that language was used to make enforcement of hot cargo agreements . . . an unfair labor practice subject to the exclusive jurisdiction of the Board and to describe the status of agreements after the NLRB" has found them to be unlawful.[16]

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[16] Res. Br. at 29. Respondents made this same argument below, but it was rejected by the Court of Appeals. The Court of Appeals held, instead, that Section 8(e) rendered hot cargo clauses void, regardless whether the NLRB had found them to be illegal, but that whether federal courts could entertain the illegality defense depended on whether the remedy sought by the plaintiff was a boycott of non-union suppliers or some other form of enforcement of the contract. (*See* 642 F.2d at 1314-15; Pet. App. 22a-23a. *See also* Pet. Br. at 36 & n.66.)

The basic problem with Respondents' restrictive reading of the statutory language is that nothing supports it.[17] Their argument is little more than *ipse dixit.*

Respondents argue that the legislative history shows that Congress wanted to ensure that all hot cargo clauses "whenever executed"—not just hot cargo clauses entered into after the enactment of Section 8(e)—would be subject to the NLRB's unfair labor practice jurisdiction. (Res. Br. at 31.) The excerpts from the legislative history on which Respondents rely do appear to explain why Congress included language in Section 8(e) making its prohibitions applicable to hot cargo clauses "entered into *heretofore or hereafter*" (emphasis added). But they do not explain why Congress provided in Section 8(e), not just that all such hot cargo clauses are unfair labor practices, but also that they are "unenforcible and void." [18] That clear statutory command cannot be explained away by focusing on other statutory language.[19]

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[17] In *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 634 (1975), this Court noted that there is "no legislative history . . . suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive."

[18] *See* Pet. Br. at 35-41. Respondents' reading of Section 8(e) not only ignores the "unenforcible and void" language, but also would render that language meaningless. According to Respondents, that language is intended to describe the status of hot cargo clauses *after* the NLRB has found them to be unlawful. Res. Br. at 29. As with all unfair labor practices, however, once the NLRB has found a contract clause to be illegal, it is required by Section 10(c) of the LMRA, 29 U.S.C. § 160(c) (1976), to issue a cease and desist order preventing enforcement of the illegal clause. *International Woodworkers Local 3-10 v. NLRB*, 380 F.2d 628, 630-31 (D.C. Cir. 1967); *UAW v. NLRB*, 427 F.2d 1330, 1331-32 (6th Cir. 1970). The "unenforcible and void" language in Section 8(e) is thus not needed to prevent enforcement of hot cargo clauses that have already been found illegal by the NLRB; yet, according to Respondents, that is its only purpose.

[19] As this Court has recognized, where a statute provides that certain contracts are "void," "[a]t the very least," the statute "could be raised defensively in private litigation to preclude the enforcement of [the] contract." *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 18 (1979).

Second, Respondents seek to extract from this Court's decisions the principle that under no circumstances may federal courts decide unfair labor practice-type issues. They argue that "this Court has never wavered from the principle" that federal courts must "abstain from independently resolving [any] dispute" that is identical to one that "could have been, but was not" presented to the NLRB. (Res. Br. at 27; *see also id.* at 33-35.) Even if that were true, it would not resolve the issue in this case, for none of the cases cited by Respondents involved the issue whether a federal court may decide whether a contract clause it is asked to enforce violates federal law.[20]

Moreover, Respondents' reading of the cases is incorrect. In *Connell*, for example, the issue whether the contract provision in question comported with Section 8(e) "could have been, but was not" presented to the NLRB by the employer who was challenging the clause. Nevertheless, this Court resolved the issue and decided that the

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[20] In summarily dismissing as "untenable" the distinction between remedies and defenses, Respondents fail to recognize that a court must resolve the illegality defense in order to determine whether the contract clause the plaintiff seeks to enforce has any legal effect in the first place and, thus, whether the plaintiff is entitled to the remedy it seeks. Respondents also fail to distinguish the many cases allowing a party to raise as a defense matters that it may not assert as an affirmative claim for relief. (*See* Pet. Br. at 32 & n.61.) In all those cases, the same sort of "doctrinal foundations" as those that underlie the NLRB's exclusive jurisdiction over labor law remedies (Res. Br. at 26) were thought to preclude the court from deciding the issue when it arose in an affirmative claim for relief. But in none of the cases were those doctrinal foundations held to supersede the court's need to be able fully to resolve the case before it by deciding the issue when it was raised as a defense. As Judge Hand explained, for example, in *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189-90 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), federal courts have exclusive jurisdiction over actions brought under the federal antitrust laws to ensure that those laws are "uniformly administered," but it is not "inconsistent" to allow "violations of the Acts to be raised as valid defences to actions brought in state courts."

provision violated Section 8(e).[21] Similarly, in *Vaca*, this Court held that the exclusive jurisdiction doctrine has no application to suits, like this one, brought under Section 301 of the LMRA and that "the jurisdiction of the courts" is not "destroyed by the fact that the employee [plaintiff] . . . finds it necessary to prove an unfair labor practice . . . ."[22] And in other cases, too, this Court has

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[21] *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 626, 634 (1975). As noted in Kaiser Steel's opening brief, under *Connell* the court would have had to resolve the issue whether the purchase-of-coal clause comports with Section 8(e) if Kaiser Steel had sought a declaratory judgment that the clause violates the Sherman Act (*see, e.g., Granddad Bread, Inc.* v. *Continental Baking Co.*, 612 F.2d 1105, 1109-11 (9th Cir. 1979), *cert. denied*, 101 S. Ct. 854 (1981)), and the court in this case will also have to do so if Kaiser Steel is permitted to raise its antitrust defense. (*See* Pet. Br. at 41-42 n.78.)

In an effort to explain away Justice Stewart's statement in *Connell* that a party may "simply . . . ignore" a contract provision that violates Section 8(e) and that any effort to enforce such a provision "would obviously be unavailing" (421 U.S. at 649-50 n.9 (dissenting opinion), *quoted in* Pet. Br. at 39), Respondents assert that the statement "certainly" means that Kaiser Steel cannot raise the 8(e) defense in this case but instead had to seek relief from the NLRB when this suit was filed. (Res. Br. at 35 n.31.) There is no basis for Respondents' reading of Justice Stewart's statement.

[22] *Vaca v. Sipes*, 386 U.S. 171, 184, 186, 187 (1967). The Court held that a federal court may decide whether a union had breached its duty of fair representation, even though such a breach would have been an unfair labor practice and even though the employee challenging the union had not sought relief from the NLRB. Respondents assert, without explanation, that the considerations on which the Court relied in *Vaca* are "inapposite here." (Res. Br. at 35 n.32.) But the factors to which the Court pointed in explaining why its decision would not disserve the objectives of the exclusive jurisdiction doctrine were not intended to be exhaustive (*see* 386 U.S. at 179). More important, those considerations—the extent to which the labor law issue before the court has been "judicially developed" and the comparative expertise of the NLRB and the courts regarding the particular issue (*id.* at 181)—are equally applicable here. (*See* Pet. Br. at 44.)

decided issues identical to those that could have been presented to the NLRB.[23]

In short, it has not been the law that only the NLRB can resolve legal disputes that could have been presented to it. To the contrary, while only the NLRB may provide affirmative labor law remedies for unfair labor practices, the federal courts may resolve labor law issues that arise in cases, like this one, otherwise properly before them, regardless whether those issues could have been presented to the NLRB.

Third, Respondents dispute our suggestion that the Court of Appeals' construction of the LMRA renders it unconstitutional.[24] Respondents argue that only the NLRB can provide remedies for unfair labor practices, that Congress decided not to create a private right of action for unfair labor practices, and that the constitutionality of that decision has been upheld. (Res. Br. at 36-37.)

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[23] *E.g.*, *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). Respondents would distinguish these cases on the ground that they hold only that federal courts are not precluded from deciding contract actions simply because the breach is also an unfair labor practice. (Res. Br. at 35.) This purported distinction ignores the language of those cases, which, far from being so limited, states without qualification that the exclusive jurisdiction doctrine has "no application" to suits brought under Section 301. (*See* Pet. Br. at 42.)

[24] Respondents reiterate the argument they pressed in opposition to our Petition for Certiorari that Kaiser Steel has improperly raised this constitutional issue for the first time in this Court (Res. Br. at 36). That is not the case. From its inception, this case has concerned the proper construction of the LMRA. It is the Court of Appeals' construction, which as noted is different from the construction urged by Respondents (*see* n.16, *supra*), that gives rise to the constitutional problem, and we have pointed out that problem in support of our contention that the Court of Appeals' construction of the statute is incorrect. The issue arose for the first time after the Court of Appeals' decision, and it is properly before this Court.

Respondents' argument misses the point. This case does not call into question the constitutionality of Congress' decision to make the NLRB the exclusive forum for obtaining remedies for unfair labor practices. Rather, this case concerns the defenses that Kaiser Steel may raise when the power of a federal court is invoked to enforce an illegal contract clause. Article III of the Constitution both prohibits legislation that withdraws controlling questions of law from federal enforcement courts and ensures that courts remain free fully to decide cases over which Congress gave them jurisdiction. The Court of Appeals' decision that the LMRA requires a federal court to enforce an illegal hot cargo clause, even though neither it nor any other court has ever been able to pass on the lawfulness of the clause, runs afoul of these principles and renders the statute unconstitutional.[25]

III. THE AWARD OF ATTORNEYS' FEES IS NOT AUTHORIZED BY ERISA.

Respondents make three arguments in support of the award of attorneys' fees. None is correct.

First, Respondents argue that this suit was brought to enforce the UMW's health and retirement plans. To the contrary, the complaint alleges that Kaiser Steel violated the collective bargaining agreement, not that it violated any pension plan. Respondents never put any plan in the record or otherwise brought the provisions of any such plan to the attention of the district court.[26] More-

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[25] *See* Pet. Br. at 44-47. Neither *Yakus v. United States*, 321 U.S. 414, 428 (1944), nor *Bowles v. Willingham*, 321 U.S. 503, 520-21 (1944), the two cases cited by Respondents, is to the contrary. In both cases, the statutes in question assured aggrieved persons of an opportunity for judicial review of their legal contentions by an Article III court; thus, neither case presented the question at issue here—whether Congress can withdraw from an enforcement court a controlling question of law that no court has been able to decide.

[26] Respondents seek to excuse this failure by arguing that Kaiser Steel did not oppose their request for fees in the district court. (Res. Br. at 49 n.43) In fact, however, Kaiser Steel repeatedly contested Respondents' entitlement to attorneys' fees in the district

over, this suit could not have been brought to enforce any such plan because none of the plans imposes any obligations on Kaiser Steel. As Judge Wilkey concluded in his dissent in the Court of Appeals, the plans—even as characterized by Respondents—include only "a description of the source of funding and impose[] no independent obligation on Kaiser." [27] Because the plans impose no obligations on Kaiser Steel, Kaiser Steel could not have violated or breached the plans, and Respondents could not have brought this action to enforce the plans.

Second, Respondents argue that this suit was brought to enforce ERISA. They reason that ERISA imposed fiduciary obligations on them and that they would have risked violating ERISA if they had not brought this suit. (Res. Br. at 49-50.) But even if ERISA did require Respondents to sue, this action would not be one brought to enforce ERISA. As Judge Wilkey noted, Respondents' argument "confuse[s] an effort to *comply* with ERISA

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court. *See* Memorandum in Opposition to Motion of Plaintiffs for Summary Judgment (Oct. 17, 1978) at 35 n.44 (C.A.J.A. 325); Memorandum in Support of Motion To Transfer (June 2, 1978) at 4 n.* (C.A.J.A. 84); *see also* Reply in Support of Motion To Transfer (July 5, 1978) at 7-8 n.8 (C.A.J.A. 134-35); Answer of Defendant Kaiser Steel Corporation (June 2, 1978) at 1 ¶ 1 (C.A.J.A. 71). In any event, it was Respondents' burden to prove their entitlement to attorneys' fees and to place in the record the alleged basis for that claim. As it was, the district court awarded attorneys' fees "without explanation, and without the benefit of briefing or oral argument." 642 F.2d at 1334; Pet. App. 65a (Wilkey, J., dissenting).

[27] 624 F.2d at 1334-35; Pet. App. 66a-67a (Wilkey, J., dissenting). In their Statement of Facts, Respondents state that the funding of the trusts is governed solely by the collective bargaining agreement and make no mention of the plans. (Res. Br. at 3.) With respect to the plans themselves, Respondents say only that they "make[] clear that employers were to fund" the trusts in accordance with the terms of the collective bargaining agreement and that two of the plans "expressly state" that contributions to the trusts are to be made in accordance with that agreement. (*Id.* at 49 & n.43.)

with an action to *enforce* it." [28] Because Respondents do not allege that Kaiser Steel has violated any provision of ERISA, this action could not have been brought to enjoin or redress a violation of that statute.

Finally, Respondents argue that the attorneys' fee award is authorized by Section 306(b) of the 1980 ERISA amendments. As we pointed out in our opening brief, however, that section authorizes a fee award only in actions brought under Section 306(a) of the 1980 ERISA amendments. (Pet. Br. at 49.) This is not such an action. Section 306(a) was enacted and became effective after the Court of Appeals' decision in this case. As will be seen below, it does not apply to the 1974 collective bargaining agreement at issue here.

IV. THE 1980 ERISA AMENDMENTS DO NOT REQUIRE ENFORCEMENT OF THE PURCHASE-OF-COAL CLAUSE.

Respondents and the Solicitor General argue that Section 306(a) of the 1980 ERISA Amendments,[29] which was enacted and took effect after the Court of Appeals' decision in this case (and years after expiration of the 1974 collective bargaining agreement here at issue), requires enforcement of the purchase-of-coal clause. Their analysis of Section 306(a) and its applicability to this case is seriously flawed.

A. Section 306(a) Does Not Make Illegal Contract Clauses Enforceable.

Congress enacted Section 306(a) of the 1980 ERISA Amendments, as Respondents put it, to "creat[e] . . . a direct . . . ERISA cause of action for the collection of delinquent contributions by trustees of multiemployer plans." (Res. Br. at 38.) The section serves this pur-

[28] 642 F.2d at 1335; Pet. App. 67a (Wilkey, J., dissenting) (emphasis in original).

[29] Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 (the "1980 ERISA Amendments"), Pub. L. No. 96-364, 94 Stat. 1208 (1980), added Section 515 to ERISA, 29 U.S.C.A. § 1145 (West Supp. 1981).

pose by providing that every employer who is obligated by a plan or collective bargaining agreement to make pension fund contributions "shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C.A. § 1145 (West Supp. 1981).

Far from abolishing the illegality defense, Section 306(a) explicitly requires employers to contribute to pension funds only where doing so would not be "inconsistent with law," and the phrase "inconsistent with law" is in no way qualified or restricted. By its terms, the statute thus suggests reaffirmation of the longstanding principle that illegal contract clauses will not be enforced. Where making contributions would be "inconsistent with law"—where, for example, making the payments would be an act in furtherance of an illegal agreement or where the law provides that the employer may defend an action seeking contributions to a pension fund on the ground that the contract clause calling for such contributions violates federal law—then the employer is not required to make the contributions.

As with their construction of Section 8(e), however, Respondents, and in this case the Solicitor General, reject this straightforward construction of the statutory language. They construe it to mean instead that, where a contract provision calls for employer contributions to pension funds, employers must make those contributions, even if the provision calling for them is illegal, so long as the mere payment of money would not be illegal "in and of itself" or if made "gratuitous[ly]."[30] In other

[30] S.G. Br. at 11, 30; *see* Res. Br. at 45. This construction is certainly not the one most readily suggested by the statutory language. Indeed, Respondents themselves quoted Section 306(a) in its entirety in the text of their Opposition to Kaiser Steel's Petition for Certiorari, but they did not even suggest that the section might have the effect of restricting illegality defenses of the sort at issue here. *See* Brief for Respondents in Opposition at 25.

Respondents now argue that Section 306(a) was intended to preclude defenses "not grounded in the terms of the agreement." Res. Br. at 38, 39. So characterized, Section 306(a) would not

words, their construction of Section 306(a), like Respondents' reading of *Kelly v. Kosuga*, turns entirely on the purported distinction between illegal conduct and conduct taken pursuant to illegal agreements. As discussed above, however, that distinction is conceptually flawed and has no support in the law.[31]

Respondents and the Solicitor General base their narrow construction of the statutory language on statements by two Congressmen in the legislative history of the amendments.[32] Those statements are too thin a reed on which to rest a construction of the statute that is contradicted by its plain language and would overrule basic legal principles concerning the enforceability of illegal contracts that have been embodied in judicial decisions for decades.[33]

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preclude Kaiser Steel's defense in this case, for nothing could be more "grounded in the terms" of the purchase-of-coal clause than the defense that that very clause is illegal and void and creates no enforceable rights.

[31] *See* pp. 8-12, *supra*.

[32] *See* 126 Cong. Rec. S10,102 (daily ed. July 29, 1980) (remarks of Sen. Williams in colloquy with Sen. Matsunaga); *id.* at S11,673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); *id.* at H7,899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson). A similar statement previously appeared in a committee print of the proposed bill. *See* Staff of the Senate Comm. on Labor and Human Resources, S. 1076: The Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. 44 (Comm. Print April 1980) ("Comm. Print"). That document, of course, was only a committee staff document prepared for the use of the Committee and is not an expression of the views of the Committee itself.

[33] Section 306(a) was included in the 1980 ERISA Amendments under circumstances that make it all but impossible to believe that Congress was aware of—much less understood and adopted—fleeting remarks in the debates that were not expressly included in the statutory language. As Senator Armstrong observed, the bill containing Section 306 was "amended, altered, changed, and otherwise fiddled with no less than 335 times" in the 30 days since it had been reported out of the Labor Committee, and the process by which the bill was hurried through Congress was "silly" and

Moreover, even if Section 306(a) were construed as if Congress had adopted the views expressed by those Congressmen, it would still not require enforcement of illegal contract clauses calling for pension fund contributions. In the first place, the two Congressmen were concerned about the ability of pension fund trustees to enforce lawful obligations of employers to make contributions to pension funds. They did not say that employers should be precluded from raising *any* defenses in actions brought to recover such contributions.[34] To the contrary, they expressed concern only about employers seeking to avoid their obligations under lawful contract clauses on the basis of allegations of the unrelated or collateral illegality of other contract provisions or events outside the contract. Every time the Congressmen decried defenses raised in collection actions, they spoke of "unrelated" [35] or "extraneous" defenses,[36] and the cases they mentioned similarly involved only extraneous or collateral defenses.[37]

"sloppy": "No bill for markup. No committee report. No 3-day rule for Senators to consider [the] legislation." 126 Cong. Rec. S10,168 (daily ed. July 29, 1980). *See also* 126 Cong. Rec. H6,934 (daily ed. July 31, 1980) (remarks of Rep. Frenzel); 126 Cong. Rec. S10,561 (daily ed. Aug. 1, 1980) (remarks of Sen. Jepsen).

[34] Indeed, Congress rejected a proposal made by Theodore Grooms on behalf of the Western Conference of Teamsters Pension Fund (*quoted in* S.G. Br. at 19) that would have abolished all defenses in actions to enforce certain types of provisions in collective bargaining agreements calling for payments to pension funds.

[35] 126 Cong. Rec. at S11,673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); *id.* at H7,899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson); *see also id.* at S10,102 (daily ed. July 29, 1980) (query by Sen. Matsunaga); Comm. Print, *supra*, at 44.

[36] 126 Cong. Rec. at S11,673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams).

[37] The Congressmen mentioned five cases; but, as the Solicitor General recognizes, "none of those cases involved the enforcement of a contribution clause that itself was alleged to violate the law." S.G. Br. at 28. The Congressmen applauded *Lewis v. Benedict Coal Corp.* and *Huge v. Long's Hauling Co.*, both of which involved lawful contract clauses requiring pension fund contributions (*see* pp. 2-5 & n.3, *supra*), and *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d

Respondents' and the Solicitor General's interpretation of the remarks upon which their argument is based is unsound for another reason as well. Had the two Congressmen meant to abolish all defenses other than those based on the legality of the act of making the contributions "in and of itself," as Respondents and the Solicitor General believe, they presumably would have condemned all defenses "unrelated" or "extraneous" *to the making of payments.* Instead, they criticized only defenses "unrelated" or "extraneous" to "the employer's *promise and the plan's entitlement* to the contributions." [38] Thus, these Congressmen seem clearly to have contemplated that courts could continue to entertain the defense that the contractual *promise* sued on—like the purchase-of-coal clause here—is illegal and that the funds are therefore not entitled to the payments they seek.[39]

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552 (6th Cir. 1962), which barred an employer from raising, as a defense to a suit to enforce a lawful contract clause requiring pension fund contributions, an allegation that the fund had not been properly administered by the trustees. The Congressmen criticized *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980), *appeal pending* (D.C. Cir. No. 80-1501), and *Trust Fund v. McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979), *appeal pending* (9th Cir. No. 80-3024), both of which held that even lawful contract provisions in "pre-hire" agreements entered into pursuant to Section 8(f) of the NLRA do not create enforceable rights until after union certification. But even if these latter two cases had been decided to the contrary, as the two Congressmen evidently wished, they would have meant only that lawful provisions in "pre-hire" agreements are enforceable prior to the time the agreements are repudiated by the employer. Such a holding would not make enforceable illegal contract clauses calling for pension fund contributions.

[38] *See* nn.35, 36, *supra* (emphasis added).

[39] There is another reason why Section 306(a) should not be construed to abolish the illegality defense in ERISA actions. If that section were construed to mean that a federal court must enforce a contract clause even though neither it nor any other court has had an opportunity to decide whether the clause violates Section 8(e), it would raise the same constitutional problem as that posed by the Court of Appeals' construction of the LMRA. *See* Pet. Br. at 44-47. (Congress could, to be sure, amend Section 8(e)

In sum, Section 306(a) of the 1980 ERISA Amendments does not abolish the illegality defense in contract actions brought by pension fund trustees. It was intended to achieve the very different purpose of providing a new cause of action and new remedies for wrongful breaches of collective bargaining agreements. It expressly limited the new duty it was imposing upon employers to a requirement to make payments where "not inconsistent with law." While two Congressmen expressed concern about extraneous defenses raised by employers in collection actions, they limited their concerns to defenses that are "unrelated to the employer's promise to pay and the plan's entitlement to the contributions." Neither their remarks nor the language of the statute can plausibly be read to abolish the heretofore unbroken rule that courts do not enforce illegal contract provisions.

B. Section 306(a) Does Not Apply to the Conduct at Issue in This Case.

Even if Section 306(a) of the 1980 ERISA Amendments were intended to bar employers from raising the kinds of illegality defenses that are at issue here, it would not apply retroactively to create liability for the conduct involved in this case—Kaiser Steel's failure to make contributions under an agreement that took effect in 1974 and terminated in 1977. To apply Section 306(a) to conduct that occurred nearly three years before its effective date would conflict with the intention of Congress and violate essential notions of fairness.

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of the LMRA to make collective bargaining provisions like the purchase-of-coal clause lawful in these circumstances. But it did not do that in Section 306(a). *See* 1A Sutherland Statutes and Statutory Construction 139-40 (C. Sands ed. 1972) ("Amendments by implication . . . are not favored" and Congress will not be held to have amended a prior statute "unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together"). Congress should no more be presumed improperly to have sought to require federal courts to enforce illegal contracts without judicial review by juxtaposing the ERISA Amendments and the LMRA than by the LMRA alone.)

The structure of the statute and its legislative history show that Congress intended Section 306(a) to operate only prospectively and not to apply to conduct that terminated prior to the effective date of the statute.[40] Section

[40] The issue here is not, as Respondents and the Solicitor General evidently believe, whether Congress intended Section 306(a) to apply in pending cases (*see* Res. Br. at 46; S.G. Br. at 31-32). Rather, the question is whether Congress intended the new substantive duty established by Section 306(a) to apply to conduct that occurred years before its effective date. This Court has long recognized that "legislation must be considered as addressed to the future, not to the past," *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913), and that "[r]etroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944).

Respondents and the Solicitor General rely exclusively on the principle of *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), that an appellate court should presumptively "apply the law in effect at the time it renders its decision." *Bradley*, however, was not addressed to the question whether new statutory duties are to be applied retroactively to completed conduct. Indeed, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), decided earlier in the same term as *Bradley*, the Court declined to apply new statutory and regulatory provisions to past conduct. Although the new provisions were "in effect" at the time of the Court's decision and would have applied had the conduct occurred after they became effective, the Court noted simply that "the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us." *Id.* at 639 n.8.

In none of this Court's cases applying the *Bradley* principle was an intervening change in law applied to alter the substantive principles applicable to past conduct. Those cases involved changes that affected future conduct (*see United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (treaty provided for restoration of property not definitely condemned prior to its ratification); *Thorpe v. Housing Auth.*, 393 U.S. 268, 281-83 (1969) (change in applicable housing regulations applied to evictions sought after change took effect); *Cort v. Ash*, 422 U.S. 66, 76-77 (1975) (statute creating Federal Election Commission as exclusive forum for adjudicating campaign finance violations applied where plaintiff sought only injunctive relief against future violations); *cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 164-65 (1975) (amendment to the Freedom of Information Act changing the standards for the "in-

306(a) creates a new statutory duty to make pension fund contributions called for by collective bargaining agreements. Congress provided that that section "shall take effect" on the date of enactment, September 26, 1980.[41] Nothing in the Amendments suggests that the new duty created by Section 306(a) is to apply retroactively. The logical construction of a statute that creates a new duty and establishes an effective date for it is that the duty applies only to conduct occurring after the effective date.

Indeed, Congress carefully considered whether and when to give retroactive application to the new substantive provisions of the 1980 ERISA Amendments, and it explicitly provided for retroactive application of other provisions of those Amendments that it wanted to apply retroactively.[42] Congress made no such provision for retroactive application of Section 306(a). In light of its explicit choice to do so in other areas, it cannot be said to have intended that section to apply retroactively.[43]

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vestigative records" exception applied prospectively to documents not yet disclosed)) or that merely provided new remedies, specifically the award of attorneys' fees, for the violation of pre-existing substantive duties (*see Bradley v. Richmond School Board*, 416 U.S. 696, 721 (1974); *Hutto v. Finney*, 437 U.S. 678, 694-95 n.23 (1978)).

[41] 29 U.S.C.A. § 1461(e)(1) (West Supp. 1981).

[42] The extensive provisions establishing liability for employers who withdraw from multiemployer pension plans (29 U.S.C.A. §§ 1381-1405 (West Supp. 1981)) were generally made effective on April 29, 1980, almost five months before the enactment of the statute. 29 U.S.C.A. § 1461(e)(2) (West Supp. 1981). The floor debates show that Congress considered the possible unfairness of applying the new statutory requirements to conduct occurring before the statute was enacted and carefully selected the effective date to reconcile its concerns about fairness with the special need for retroactive application of the withdrawal provisions. *See* 126 Cong. Rec. S10,101 (daily ed. July 29, 1980) (remarks of Sen. Javits); *id.* at S10,156-58 (colloquy between Sens. Pressler and Matsunaga).

[43] Respondents cite *NLRB v. Amax Coal Co.*, 101 S. Ct. 2789, 2799 n.22 (1981), and *Trustees, Local 387 Pension Fund v. Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1104-05 (N.D. Ga. 1981) (Res. Br. at 48 n.42), but neither applied the 1980 ERISA Amend-

To apply Section 306(a) retroactively to Kaiser Steel's terminated conduct would, moreover, be fundamentally unfair. If Respondents' and the Solicitor General's construction of Section 306(a) were correct, that section would impose a new substantive duty on employers by requiring them to make contributions called for by contract provisions that violate the antitrust and labor laws. In addition, Section 306(b) provides new and unforeseen remedies for violations of this new duty, including the mandatory award of attorneys' fees and the award of interest at twice the prevailing rate.[44]

Had Kaiser Steel been subject to such a duty during the contract term, its conduct would have been materially different from what it was. Kaiser Steel decided not to comply with the purchase-of-coal clause because it believed, on the basis of the law in effect during the term of the 1974 agreement, that that clause was illegal and unenforceable and that, if Respondents reversed their longstanding policy of nonenforcement of the clause, it would be able to raise the illegality defense. To deny

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ments to alter retroactively the standards applicable to conduct that occurred prior to the effective date of the Act. *Amax* referred to the 1980 ERISA Amendments only in passing; those Amendments had no direct bearing on the questions presented; and the Court's decision rested entirely on prior law. *Southern Stress Wire* referred to the 1980 ERISA Amendments only in connection with its interpretation of the prior law.

[44] *See* 29 U.S.C.A. § 1132(g)(2) (West Supp. 1981). It is questionable whether the provision for double interest, which allows a monetary award that is grossly excessive in relation to any actual damages suffered by the funds and is thus penal in nature, may be applied retroactively to Kaiser Steel in any event. *See Shwab v. Doyle*, 258 U.S. 529, 534 (1922). One district court has applied the provision retroactively where the pension plans themselves provided for interest and attorneys' fees. The court noted that retroactive application of the interest provision in that case would not impose any unanticipated obligation on the employer, but its analysis appears in some respects to have been erroneous. *Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co.*, Civ. No. 77-70031 (E.D. Mich. Aug. 26, 1981). The question of retroactive application of the double interest provision is, however, not before the Court in this case.

Kaiser Steel the opportunity now to raise the illegality defense, and instead to subject Kaiser Steel to new duties and sanctions allegedly created by a statute that was not enacted or in effect until nearly three years after the 1974 agreement expired, would place Kaiser Steel in a substantially worse position than it would have been in had the new statute been in effect during the contract period.

Such prejudicial retroactive application of the new statute would be improper. In none of the cases cited by Respondents or the Solicitor General did a court give retroactive effect to a new statutory duty by imposing sanctions for breaches of that duty on account of conduct that occurred before the effective date of the statute. To the contrary, retroactive application of a new statute is especially disfavored where a party has relied on the prior law and application of the new law would prejudice his interests.[45]

Even under the standards of *Bradley*, retroactive application of Section 306(a) would result in "manifest injustice" and would therefore be impermissible.[46] *Bradley* made clear that manifest injustice could result where a new statute imposes "new and unanticipated obligations" upon a party on account of its past conduct.

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[45] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945); *Welch v. Henry*, 305 U.S. 134, 147 (1938); *Milliken v. United States*, 283 U.S. 15, 21 (1931). *Cf. Allied Structural Steel Corp. v. Spannaus*, 438 U.S. 234, 249 (1978). The Solicitor General cites a number of cases regarding retroactive application of laws governing the legality of contracts. (S.G. Br. at 34.) In none of those cases, however, was there any indication that the party asserting the defense would have altered his conduct had he known the new law would apply. Moreover, in those cases the contracts at issue were lawful at the time enforcement of them was sought; here, in contrast, the purchase-of-coal clause is illegal, and the issue concerns only the availability of the illegality defense.

[46] *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). *See also Greene v. United States*, 376 U.S. 149, 160 (1964).

(416 U.S. at 720.) The Court emphasized that the statute at issue there—in contrast to Section 306 as construed by Respondents and the Solicitor General—created "no change in the substantive obligation of the parties" (*id.* at 721) and that—in contrast to this case—there was no allegation that knowledge of the new statute "would have caused [the defendant] to order its conduct so as to render this litigation unnecessary" (*id.*).[47] It made clear that a different result would be called for where, as here, "additional or unforeseeable obligations" (*id.*), allegedly created by a new statute, are sought to be imposed retroactively.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the Court of Appeals' decision should be reversed, and the case should be remanded for further proceedings to determine whether the purchase-of-coal clause is illegal.

Respectfully submitted,

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[47] The Solicitor General suggests that the obligations of Section 306 are not "new and unanticipated" because Kaiser Steel was aware that it might not prevail on the merits. S.G. Br. at 35. But Kaiser Steel was not aware that it would be retroactively barred from litigating the merits of its defenses altogether. Nor was it aware that its failure to comply with the purchase-of-coal clause would be retroactively subject to punitive sanctions. Here, unlike *Bradley*, Kaiser Steel "order[ed] its conduct" differently in reliance on the prior law and would be prejudiced by retroactive application of the new law.